Supreme Court, U.S.
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No. 96-1985

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

WILLIAM SNOW HUME,
Petitioner,

VS.

W. J. WALLIS, MICHAEL C. MAYNARD,
JAMES DON BANKHEAD, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent GODFREY, in an apparent change of heart, has filed a Brief in Opposition[1]. Respondent GODFREY has introduced new matters that demand refutation.

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[1] Petitioner asks the Court to observe the "Appearance Form/ Waiver" filed at 2:06 PM on June 24, 1997, by Harold W. POTTER of the Law Office of Richard D. Jones, in which POTTER asks the Clerk to "enter [his] appearance as Counsel of Record for ... respondent[] ... William Peter Godfrey," and in which he states that he "do[es] not intend to file a response to the petition for a writ of certiorari."

I. Respondent GODFREY has introduced falsities in his "Statement of the Case" and elsewhere.

Petitioner will address the falsities *seriatim*, as these appear.

Firstly, GODFREY says in his Brief at page 1 that Petitioner made certain admissions, "asserting he had the legal right to do so because they were posted illegally." That is false. Both the state and federal complaints assert that the right arose because the signs were posted in *criminal trespass* and were *public nuisances as a matter of law*. The District Attorney repeatedly has admitted that he will not prosecute removals of trespassory signs, and he ceased the prosecution of the Petitioner when he concluded that the subject signs were in criminal trespass, as Petitioner had steadfastly maintained. The gravamen of the causes of action sounding in malicious prosecution is that respondent GODFREY lied, and got certain other respondents to lie for him, in order to conceal that his signs had been placed in criminal trespass. For the same reasons as just cited, GODFREY's footnote 1 at his Brief is similarly misleading.

Secondly, GODFREY says in his Brief at page 2 that defendant Unocal had property "from [which] some of the signs had been removed." That is a lie. The precise lie that GODFREY and his coconspirators perpetuated in the underlying criminal prosecution was that Unocal had any possessory right in the subject property whatsoever.

Thirdly, GODFREY says in his Brief at page 2 that "Petitioner filed this federal action... with pendent state claims for abuse of process." That is a half-truth. The fifth and sixth counts were, indeed, pendent state claims. But the fourth count was for "Conspiracy to Abuse Process Under Color of Law," and contained special additional allegations at paragraphs 79, 80 and 81 that clarify why there was "state

action" that is actionable under 42 U.S.C. § 1983.

Fourthly, Petitioner did not **merely** state in his Petition that "the district court... did not resolve the issue of whether it had jurisdiction of the case before imposing the stay." (*See* GODFREY's Brief, page 3 ¶ 2 and page 6 ¶ 1, second sentence.) Rather, Petitioner has continuously **additionally** maintained throughout the appeal and this Petition that the district court's *findings* preclude it from exercising jurisdiction over at least some of the counts in the case[2].

Turning to Godfrey's "Reasons for Denying the Writ":

Fifthly, GODFREY states at page 9 of his Brief that "[t]his case differs from the state court action only in that Petitioner has added allegations that Respondents' conduct purportedly violated his [constitutional] rights." In fact, Petitioner did not plead in his state court action any of the facts pertinent to the counts sounding in abuse of process. Most importantly, Petitioner could not have pleaded the facts about respondent BANKHEAD's activities in his course of duties as a public official; consequently, GODFREY observations at his footnote 3 are again misguided.

Sixthly, GODFREY states at page 12 of his Brief that "[d]emurrers to the complaint [in the state action] were sustained, the last one without leave to amend on March 29, 1996." That is a lie. The state court never even heard the

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[2] Recently Petitioner has found authority to the effect that a federal court is encouraged to use Fed. Rule Civ. Proc. 21 to dismiss parties, in order to preserve jurisdiction. *Varley v. Tampax, Inc.*, 855 F.2d 696, 701 (10th Cir. 1988)(citing *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579). By analogy, a district court ought to immediately dismiss those causes of action over which it does not have jurisdiction (according to the facts it finds), in order that it not defer its jurisdiction over the remainder of a case. (*Compare* Petition, page 19.)

Unocal demurrers until May, 1996; his ensuing comment about "two months after the state court etc." are thus partly false.

II. Respondent GODFREY wrongly cites *Hagans* in his attempt to assert that a pleading's "failure to state a claim" never defeats a court's jurisdiction, and instead always goes to the merits of the case.

Respondent GODFREY says that it "is well settled that jurisdiction is *not* defeated by the possibility that the averments of a complaint might fail to state a cause of action on which a plaintiff could actually recover." His Brief, p. 7, citing *Hagans v. Levine*, 415 U.S. 528 at 542 (1974). But the rule from *Hagans* applies to failure to state acts constituting **deprivations** rather than failure to state a constitutionally protectable **right**. *Cf. Hagans, supra*, 415 U.S. at 539.

The failure to plead an enforceable right goes to jurisdiction, rather than the merits. Thus the failure to plead the existence of a *bona fide* contract or contract right defeats federal jurisdiction based upon impairment of contracts. *City of New Orleans et al. v. New Orleans Waterworks Co. et al.*, 142 U.S. 79, 88 (1891); *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 576 (1904). Correspondingly, adequate pleading of a **right** to engage in interstate commerce goes to the federal court's jurisdiction, whereas the pleading of the deprivation of that right goes to the merits. *Weiland v. Pioneer Irrig. Co.*, 259 U.S. 498, 501 (1922).

Similarly, in a civil rights suit, the failure to state an enforceable **right** goes to jurisdiction, while the failure to state a **deprivation** goes to the merits and is properly the subject of a demurrer (in traditional common law pleading). *Swafford v. Templeton*, 185 U.S. 487, 493 (1902). Nothing stated in *Hagans, supra*, conflicts with this proposition.

Unless there is a violatable/ deprivable federal right placed at issue in the pleadings, there is no federal subject matter jurisdiction, as the preceding cases make clear. In the instant case, the district court below never decided whether or not there was pleaded a federally protectable right that could even be violated through a malicious prosecution or abuse of process. See GODFREY's Appendix A, at his Brief. The district court simply never resolved this threshold issue which governs the existence of its subject matter jurisdiction. Its jurisdiction uncertain, it should not have proceeded to an abstention analysis.

Finally, Respondent GODFREY has confused the issue of the *uncertainty* of jurisdiction, caused by lack of resolution of whether the complaint "failed to state an enforceable federal right," with the *impossibility* of jurisdiction, caused by the court's finding of facts about the Petitioner's purported motivations for alleging that respondent BANKHEAD acted in the course of his duties[3].

III. The available authority is against respondent GODFREY's assertion that Petitioner has waived his fourth "question presented."

Respondent GODFREY says at page 12 of his Brief that, because Petitioner did "not address the fourth question in the body of his Petition... it should be deemed waived."

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[3] It is notable that respondent GODFREY did not even address the effect of the *Stitch v. City of Fullerton, James Don Bankhead* suit. (*See* Petition for Certiorari, pp. 4-5.) No doubt this is because respondent GODFREY, like his corespondents BANKHEAD and JAN FLORY AKA JANESSE BORIS, is getting his legal fees in the instant suit paid for by the City of Fullerton.

One of the few treatises concerning practice before the U.S. Supreme Court states that

> [i]f the case contains an issue that is considered not certworthy in and of itself, but on which petitioner believes there is a good argument on the merits, it may be included among the Questions Presented. Not every important issue in a case need have a corresponding reason for seeking review thereof.

STERN, GRESSMAN, SHAPIRO and GELLER, *Supreme Court Practice*, 7th Ed., 337.

The question about the effect of an *England* reservation of federal claims upon a *Colorado River* stay analysis may or may not merely be a question that is "fairly included" in the third question presented. Certainly prospective claim preclusion, and the effect of an *England* reservation thereupon, would affect a *Colorado River* analysis, if the analysis presumes the common law criteria for the "plea in abatement for another action pending."

On the other hand, if the Supreme Court decides that a *Colorado River* stay may be imposed even where a "substantially similar" (as opposed to "parallel" or "concurrent") state court case will not dispose of all of the federal causes of action, nonetheless the Supreme Court may decide that the *England* reservation of federal claims itself is an act that bears upon the "factor" of the federal court's obligation to immediately take active jurisdiction. The Supreme Court has written that "[a]bdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 at 813 (1976). Which

"important countervailing interest[s]" might be served when an *England* reservation has permanently removed that cause of action from the state court's jurisdiction? This latter issue is not "fairly included" in the third question.

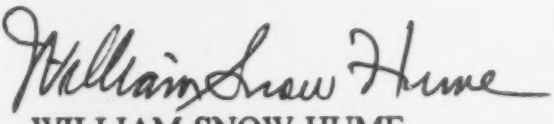
Petitioner will accordingly not presume whether or not this Court would find that the fourth "question presented" merits review in its own right.

IV. Conclusion

In his Brief, respondent GODFREY has misrepresented the law of too many federal cases to permit discussion within the page limits for a reply brief. Petitioner assumes that this Court's clerks will check all authorities and eventually find these misrepresentations, just as the District Attorney eventually discovered that respondent GODFREY misrepresented facts as a witness in the underlying criminal case. Petitioner hopes that it may suffice that he has pointed out the misrepresentations of fact in GODFREY's Brief in Opposition.

The circuit courts of appeal are now fully split on several *Colorado River* doctrinal issues, all pertaining to the important matter of a federal court's obligation to take jurisdiction. Petitioner again urges this Court to grant his Petition for Certiorari.

Respectfully submitted,



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